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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 655

C. H. ACKER, DOING BUSINESS AS C. H. ACKER & COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, HENRY A. WALLACE, SECRETARY OF AGRICULTURE, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

REPLY BRIEF FOR APPELLANTS.

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ARGUMENT.

I.

THE ALLOWANCES FOR SALARIES OF SALESMEN ARE INADEQUATE AND WITHOUT FOUNDATION IN EVIDENCE.

The appellants asserted in their principal brief that the average cost of owner and employee cattle and calf salesmen in 1932 was $5,608.08 (p. 40, 82, 86); and that this amount exceeds by $1,108 the $4,500 allowed by the Secretary as a reasonable annual salary for a cattle and calf

salesman. This figure is attacked by the Government in its brief* on the ground that the cost figures used by the appellants include excessive appraised values for the services of owners.

The answers to this attack are many:

1.

The Government allowed no profit and no salary for an owner where the books of the firm did not show a salary or drawing account and where there was no profit—this although the owners rendered services (R. Vol. II, p. 648). Fifty-six, or twenty-nine per cent of the 193 owners, did not carry themselves on the books of account at any salary whatever. Hence, because all costs were not included for salesmen's services, the Government's costs are low. To correct this, the appellants made use of salary appraisal adjustments discussed in our main brief at page 116. In short, to arrive at correct costs, reasonable amounts for the value of owners' services were determined by an appraisal committee consisting of five competent but disinterested men not engaged in the livestock business but acquainted with it, which Committee had available the business records of each owner, his known managerial and salesmanship ability, and records of the volume and value of business handled. The inclusion of the allowance of compensation to owners who made no profits or who carried themselves on their books at no salary or drawing account was justified and necessary if costs were to be accurately found. And in any event if the appellants' cost figures are to be deemed too high because including items not spent even though the services were actually performed, the Government figures are by the same token too low for by the admission of the

* It is impossible when this Reply Brief is written, April 1, 1936, to refer to pages of the Government's brief because final copies thereof have not yet been received by appellants' counsel.

Government's accountant upon the stand, no compensation for an owner salesman was included where the books showed no profit and no salary for such owner (R. Vol. II, p. 648).

2.

Whether in comparing salesmanship salary allowance made by the Secretary with the market experience, there is considered the costs as found by the Government or the costs as found by the appellant, the argument is precisely the same. Indeed, the Government's own figures ground the argument for the appellants as well as do the appellants' figures. The Secretary's Findings (Par. 132, R. Vol. I, p. 147-8 and Government Exhibit 49, p. 283) show that in 1932, out of 115 employed cattle salesmen, 15 received $6,000 or more; that 10 received from $5,000 to $6,000; and that 29 salesmen, or one-quarter of the 115 employed, received more than the Secretary deemed reasonable, namely, $4,500; and this award is made in the face of the Secretary's statement in his Findings (Par. 134, R. Vol. I, p. 149) that

> "The salaries of the employed salesmen are the result of bargaining and afford a fair test of what salesmanship can be purchased for in the open market."

If the fair test is the purchase price on the open market, as the Secretary states, a figure which would exclude the 29 best employed salesmen at the yards does not comply with this fair test.

The appellants do not pay high salaries to salesmen from choice. Obviously the appellants would prefer, if they could, to pay only $4,500. Bargaining furnishes the market value, not desire or prophecy. A $2,000 salesman cannot bargain for and receive $6,000. That salesman gets $6,000 because he is worth it to the appellants; and his worth to the appellants is measured by the services which he per-

forms for the patrons of the market,—the producers of livestock.

In the *Tagg* case, only one-tenth of the salesmen received as much as the Secretary deemed reasonable; in the instant case, the Secretary's award would deprive the appellants of the services of the 29 best salesmen at the market.

Turning attention to hog salesmen salaries, the average cost as figured by the appellants is $4,188, including owner and employee salesmen; the Secretary would allow $3,600. On the Government's own figures, over one-third of the employed hog salesmen, or 22 out of 61, received in 1932 more than $3,600 (R. Vol. I, p. 148, Government Exhibit 49, p. 284). In the *Tagg* case the Secretary allowed $4,000 for hog salesmen; and 15 of the 25 employed salesmen at the Omaha market received less than $3,000 per year. Here again, as in the case of cattle, the Secretary would deprive the shipper of live stock of the services of the best third of the hog salesmen at Chicago.

The situation is the same in respect to sheep salesmen. One-third of the 16 employed sheep salesmen in 1932 received more than the $4,000 allowance of the Secretary.

Consequently in respect to the salary of salesmen for each species of live stock, the Secretary cannot justify his findings as he did in the *Tagg* case by the assertion that

> "these findings represent approximately the maximum market value of salesmanship."

(Government Brief, *Tagg* case, p. 31; R., *Tagg* case, pp. 33-34).

3.

It was asserted in the appellants' main brief (p. 93) that for every item of expense except salesmen's salaries, the Secretary tried to find a figure bearing a relationship to the normal; and that as to every item of cost in the Sec-

retary's analysis of costs, except the salary of salesmen, the Secretary in his findings listed from highest to lowest, the amount of actual costs of the firms. The Government's Brief admits this difference in the statement that

> "It demonstrates merely that the actual expenses incurred by the appellants for yarding and office expense more nearly approach the standard of reasonableness then do the average expenses which they claim to have incurred for salesmanship."

In other words, the Government contends that the test of what is reasonable is not experience and actuality but what the Secretary thinks is reasonable. If there were any evidence in the record (and the fact that the Government has pointed to none demonstrates the truth of this statement) that salaries paid to salesmen were not actually incurred and were not, in the judgment of the management of the businesses deemed necessary, then there might be a justification for the Secretary to make an allowance for salary of salesmen which does not comply with the Secretary's own definition of a fair test, namely:

> "The salaries of the employed salesmen are the result of bargaining and afford a fair test of what salesmanship can be purchased for in the open market."

4.

The appraised salary adjustments increased costs as found by the appellants 11 per cent over the costs found by the Government. Hence the quibble which the Government makes over appraised salaries and the attack upon the appellants figures is of no substance. The Government's own figures are not materially different from those of the appellants; the comparison with the *Tagg* case is the same regardless of whose figures the court adopts; and the lack of compliance with the Secretary's own definition of a fair test is likewise the same.

II.

THE POTENTIAL PERFORMANCE REQUIRED OF SALESMAN BY THE SECRETARY IS A HYPOTHETICAL CONDITION IMPOSSIBLE OF ACHIEVEMENT.

The Secretary would require of a cattle salesman at the Chicago yards 1,000 cars per year against a market average in 1932 of 392 carload equivalents per salesman. Of a hog salesman, the Secretary requires a performance of 1,060 carloads per year; the market average was 385 carloads in 1932. For sheep salesmen the Secretary would demand a performance of a sale of 1,035 carloads per year. Actual performance averaged 465 cars. (Respondent's Exhibit 12, Schedule 24.)

In the Government's brief in the table showing the performance per salesman in carloads or carload equivalents in 1932, four firms are shown as having achieved the goal demanded by the Secretary. The appellants allege that only two firms reached that average. The point of this discussion is not merely to argue whether the figure four or the figure two is the accurate figure; but to point out that the carload equivalent of average performance of salesmen as set up by the Government exceeds in nearly every instance the actual performance of such salesmen. The uncontradicted testimony of the witnesses tells in respect to each salesman how many carload equivalents were sold; and the Government accepts those figures as to what was actually done. The Government, however, in finding averages reflects a different and a higher figure.

For instance in respect to the firm of John Clay, firm number 18, the record shows that in the year of 1932 that firm sold 5,694 carload equivalents of cattle and calves. (Respondents' Exhibit 12, Schedule 24.) That firm had five

cattle salesmen: McAdams, White, DuPlan, Summers, and Johnson. The average per man was therefore 1,139 cars, as admitted by the Government in its brief under the heading "The Secretary's selection of figures as to reasonable salesmanship performance * * * is fully supported by the evidence."

In another place in its brief, the Government alleges that the average performance per salesman of cattle and calves of John Clay & Co. in 1932 was 1,668 carload equivalents. This figure is arrived at by dividing the number of carload equivalents sold by that firm by 3.45 salesmen instead of 5, thus boosting the average performance for that firm by 500 cars per man.

The Government's justification for thus boosting the average performance per salesman is that it considered only the time of a salesman spent in the selling function. Thus if a salesman helped yard cattle, wrote letters at night after the market closed, or went to the country to advise customers over the week-end and when there was no market, he was not a full-time salesman.

In similar fashion, the number of carload equivalents per salesman in 1932 for firm No. 4 is increased from 884 cars per man to 1,373, by using 4.05 salesmen rather than 6 salesmen as shown by the testimony of L. W. Conover (R. Vol. II, p. 952) and Respondent's Exhibit 12—Schedule 24, Government Exhibit 15, Schedule C.

John Clay & Co. was one of the firms achieving the goal set by the Secretary of 1,000 carload equivalents per salesman per year, this firm showing an average of 1,133 cars, which the Government in one place admits and in another denies. The other firm reaching the Secretary's goal is firm No. 66, The National Live Stock Commission Company. This firm had an average performance per man for cattle and calves in 1932 of 1,043 carload equivalents.

The Government says that the number of carload equivalents per salesman for this firm was 1,210, arriving at this figure by dividing the total carload equivalents by 4.37 salesmen (Government's Exhibit 49, p. 281) rather than by five, the number of salesmen actually employed. (Respondent's Exhibit 12—Schedule 24; R. Vol. II, p. 769.) As pointed out in our main brief, John Clay & Co. and National Live Stock Commission Company have a cattle and calf clientele made up principally of large operators, who ship in carload lots rather than carload equivalents, thus reducing the number of drafts per consignment and enabling the salesmen of those firms to make a better average than the market run (Main Brief, p. 36, *et seq.*).

It is unnecessary to state other and further instances. The same boosting of performance obtains not only in respect to cattle and calves but also in respect to hogs and sheep. No single firm reached the Secretary's goal in respect to hogs; only two, in the case of sheep.

In speaking of potential performance, the Secretary and his counsel frequently use the expression "if he had them to sell." The meaning which the Secretary implies to this expression is that if there were fewer market agencies in Chicago, those remaining would have more live stock to sell. Consequently, the Secretary determines that even though the market average per cattle and calf salesman is 392 carload equivalents, a reasonable performance would be 1,000 carload equivalents. But the expression "if he had them to sell" means much more than this. When the witnesses used that expression, as they frequently did, they referred to all the conditions attendant upon the sale of live stock; namely, the market conditions, whether good or bad, the condition of the live stock, its mode of arrival, whether it arrived in a shipment of single or plural ownership, whether a consignment contained one species or mixed

species, whether a consignment required only one draft or ten drafts, whether the cattle in one consignment were of prime steers of the same weight and condition, or whether such consignment of cattle consisted of two steers, three butcher cows, four calves, and two bulls.

If a witness stated that on one day he could sell ten carloads, the Secretary found that he could sell ten carloads every day upon the hypothesis that if one can run 100 yards in ten seconds on one day on one track he can run 100 yards in 10 seconds any other day upon any other track; or that if he can run 100 yards in 10 seconds, he can run 1,000 yards in 100 seconds. This is a purely theoretical hypothesis whether applied to a cattle salesman or to a track man. What the evidence shows is done should be taken in arriving at performance and cost rather than a prophecy as to what might be done.

We pointed out in our Main Brief (page 26, *et seq.*) not only that the Secretary's hypothesis is wrong but that the alleged testimony upon which he bases his deductions is not found in the record.

The Secretary reached his findings as to reasonable performance and as to the salary of salesmen by what he variously terms "the exercise of judgment" and "informed judgment." A judgment is a formation of an opinion concerning something by exercising the mind upon it. If the Secretary's findings had a relationship to what is done, his explanation would be understandable; but when he says that reasonable performance is the sale of 1,000 cars of cattle and calves per year per man when the market average is only 392, and when witness after witness testified that his capacity was measured by his actual performance, the Secretary's exercise of judgment partakes of the nature of a divine or unsearchable sentence.

The Secretary states under the heading "The determina-

tion of reasonable functional unit costs" that if he had adhered to any mathematical average he would have violated his own principle "which he had laid down for his own guidance" that is, a determination of what is reasonable. If the Secretary is to be permitted to say what is reasonable and what is not reasonable when there is no evidence found in the record or pointed out by the Government of inefficiency or lack of prudence or industry, there was no need of a hearing or the taking of evidence in this case. Why employ Government accountants and call many witnesses to determine what actual performance is when all that evidence is discarded? When the Secretary found that reasonable performance was 1,000 carload equivalents per man, he made a demand reached by only two firms and set up a goal of achievement so improbable that three-quarters of the cattle salesmen at Chicago reached it less than half-way.

The Secretary's minimum potential performance, that is, in the case of cattle, for instance, 1,000 cars per annum per salesman, must be postulated upon the co-ordination of a vast plurality of facts that never can synchronously exist. The variations in character, in numbers, and in times of arrival of the live stock,—the variations in demands among the buyers, dependent upon many economic factors such as markets, and even tastes,—the variations in weather conditions, feed supplies and other similar factors that circumstance the producers in the various parts of the country from which the live stock is shipped, must, of necessity, be placed under a control that only the imagination can bring into play if the performance that the Secretary demands is to be brought within the realm of probability. Conditions which exist in respect to performance are as they are because of the nature of the industry served. They cannot be controlled or regimented by man.

The Secretary's inquiry into the performance of salesmen was in respect to numbers sold and salaries paid. The only basis upon which the Secretary pretends any inefficiency in performance is upon what he judges to be too small a number; but the only endeavor to secure facts upon which to form a judgment other than upon the numbers themselves is found in a few sporadic instances of large sales made under special circumstances, and a few opinions that appear from the record not to have been grounded upon any experience either of the kind or of the duration that would warrant the Secretary's conclusions. (Findings, paragraph 125-127, R. Vol. I, p. 143-5; Main Brief, p. 26 *et seq.*)

One of the outstanding criticisms of the Government brief is the constantly repeated attempts on the part of the Government to support what the Secretary did by a reference to his findings as to what he considered, rather than meeting the challenge of pointing to the specific evidence upon which such findings were based.

The record-blind judgment of the Secretary in respect to salesmen's salaries is not helped by associating therewith the equally record-blind judgment in respect to performance. It is still an endeavor of the blind to lead the blind.

We have already pointed out that in the *Tagg* case the Secretary fixed the salesman's salary upon the basis of the maximum salaries paid. It should be noted that in that case, the Government justified the Secretary's order by pointing out that he associated therewith approximately the maximum volume. In the instant case, this treatment has been entirely departed from by employing a fiat-made low salary and disregarding the actual performance through the substitution thereof of a hypothetical one, two and one-half times as great as the actual (1000:392) and

one which the facts as to the nature of the business show to be impossible of realization.

III.

THE SECRETARY'S OWN FIGURES SHOW THAT THE UNIT COSTS FOR EACH SPECIES ARE LESS THAN THE ACTUAL COSTS OF ALMOST EVERY FIRM.

The departure by the Secretary from the evidence of this record in respect to costs and the extent to which he exercised his judgment in finding a reasonable cost is no where better illustrated than in the Government Cost Studies (Government Exhibit 49). In respect to each species of live stock, the per head costs, *found by the Government,* exceed the reasonable unit costs for the respective species, as found by the Secretary, with the exception of some half dozen instances which are explained as not typical examples. How the Secretary can justify the costs allowed by him and denominated by him as reasonable, surpasses understanding, when there is no charge of and no evidence of waste, extravagance, improvidence or want of industry. Certainly the Court should require a better answer than the Government makes, namely, the exercise of judgment. If there were evidence in this record that salesmen were not attentive to their duties or that padded expense accounts for country trips were found, or that money was heedlessly and recklessly spent, with or without the sanction of the managers of the business, then there would be a case for the exercise of judgment. But lacking any such evidence, the basis of the Secretary's exercise of judgment demands explanation. Judicial judgment must be founded on fact.

In Government Exhibit 49, beginning at page 7, the Government accountant lists for cattle and calves for the year 1932 a comparison of income and costs per car and per

head for each market agency at the Chicago Yards. Since the Secretary's reasonable costs for each species purport to include all factors of cost and are on the per head basis, the comparison with actual per head costs, as found by the Government accountant, is an exact one. The exhibit, pp. 7, 8 and 9, lists each firm by number in the lefthand column and opposite that number appear in respective columns to the right the income per car, the costs per car, the income per head, and the costs per head,—all for cattle and calves. Pages 10, 11 and 12 deal in a similar manner with hogs; and pages 13, 14 and 15 deal in a similar manner with sheep.

The Secretary's allowance per head for cattle and calves is $.4297. Of the more than 100 firms shown as handling cattle and calves in the year 1932, all but 4 had per head costs exceeding the allowance of the Secretary.

One of these exceptions is Firm No. 31. Page 49 of Government Exhibit 49, shows that this firm had a total income of $408; and Government Exhibit 15-31 shows that this income was derived from the sale of seconds, sold by Firm No. 31 for a speculator. Such sales are made for half the regular commission, the sale being consummated by a regular commission firm which received the other half of the commission. Because such other firm furnishes the yarding and other services, the only expense to Firm No. 31 was the half of the commission which was paid to the agent. Firm No. 31 had no office facilities, no capital, and incurred no other expense than the division of the commissions which accounts for the fact that of the $408 income, $204 was expense and $204, profit.

A second exception is Firm No. 72 which had a per head cost of $.2391. Government Exhibit 49, p. 50, shows that Firm No. 72 had no business getting and maintaining expense, no yarding expense, no administrative expense; and

Government Exhibit 15-72 shows that this firm conducted its business by splitting commissions with another firm which furnished the physical and personal facilities with which the business was conducted (R. Vol. I, p. 374).

A third exception is Firm No. 47 whose unit costs for cattle and calves was $.2965. Government Exhibit 15-47 shows that the selling commissions for this firm were $71.75 and that the balance of its income of $1,563.25 was for buying services.

The fourth exception is Firm No. 90, whose unit costs for cattle and calves was $.2360. This is the firm of W. R. Smith & Son, which deals exclusively in sheep (Government Exhibit 15-90, Schedule 1).

Except for the four instances just noticed, every firm had a per head cost for cattle and calves in excess of the amount deemed reasonable by the Secretary.

Significantly, the four exceptions noted did a very small volume of business in cattle and calves, thus disproving the assertion and inference made by the Secretary that small volume firms should be eliminated. So it cannot be upon the basis of that assertion and inference that the Secretary exercises a judgment upon the record.

Turning to the species hogs, there are found only three instances in which the per head costs as found by the Secretary are less than the $.1323 allowed by the Secretary as reasonable. All of the rest of the more than 100 firms handling hogs had expenses exceeding that amount per head.

We refer to the three exceptions:

(1) Firm No. 64 had a per head cost for hogs of $.1193. Firm No. 64 is the Nalley Live Stock Commission Company, which pays the Schroeder Live Stock Commission Company 35 per cent of all commissions collected on business consigned to Nalley, and all of which is sold by Schroeder

salesmen at the expense of and with the facilities of Schroeder (R. Vol. II, p. 916 and 918).

(2) Firm No. 72, unit cost per head for hogs is $.0429. This is the same firm which was an exception in the case of cattle and calves and is owned by John Patterson & Son. Strader Bros. sell all of Patterson's hogs with their own facilities and expense. Sinclair Commission Company handles all the finances and collects for livestock and make remittances for Patterson for which they get 25 per cent of Patterson's commission. Strader gets one-half of the commission after deducting the 25 per cent which Sinclair gets for clearing (R. Vol. II, p. 375).

(3) The third exception is Firm No. 82 which had a unit cost for hogs of $.1154. Government Exhibit 15-82, Schedule 2, shows that the salesmen of this firm were owners who drew no salaries and employed no salesmen and cleared its business through another firm.

In respect to sheep, no single firm had a unit or per head cost below the $.0485 allowed by the Secretary as reasonable. Every firm exceeded, by the Secretary's own figures, his total reasonable cost per head for sheep.

The astounding facts reflected in the pages of Government Exhibit 49 referred to above are also shown in the table at the top of page 90 in the appellants' Main Brief in which the comparison is made between the Secretary's reasonable cost per car and the figures found by the Government to be the actual cost per car.

IV.

THE GOVERNMENT'S ASSERTION THAT THE EVIDENCE JUSTIFIES THE PERFORMANCE DEMANDED OF SALESMEN IS ERRONEOUS AND BASED UPON ISOLATED STATEMENTS FROM THE TESTIMONY OF WITNESSES, IGNORING THE COMPLETE STORY TOLD BY SUCH WITNESSES.

In the Appellants' Main Brief, page 26 *et seq.*, the Appellants discuss the paraphrased findings of the Secretary in respect to salesmen performance (Paragraph 125, R. Vol. I, p. 163), demonstrating that each statement made in that paragraph incorrectly reflects the evidence in the record. The Secretary's order cannot be predicated upon his findings if the findings are not supported by evidence.

In their brief, Government counsel refer to the testimony of Mr. Mollin, Secretary of the American Live Stock Association. Three times in the testimony quoted in the Government's brief from Mr. Mollin, he said "I think"; then follow his conclusions as to what he "thinks." The testimony of this witness is dealt with completely on pages 27, 28 and 29 of the Appellants' Main Brief. His entire testimony as to what he "thinks" can be done is demolished by his statement (R. Vol. I, p. 313) that he had

"seen sales made occasionally."

He further stated that he was not familiar with the situation after the year 1929 (R. Vol. I, pp. 316-317).

The Government refers to the testimony of Harold Summers, a salesman for John Clay & Co., dealt with on page 26 of Appellants' brief. It is true this witness had on the day previous to his testimony sold, with another salesman, 18 or 19 loads of butcher stuff; but in answer to the question as to how many he could sell in a year, considering "the

days as they run throughout the year'' (R. Vol. I, p. 359) he answered:

> "Well, I may not be able to answer you correctly. If I did answer it, it would be only guess work'' (R. Vol. I, p. 364).

Next the Government refers to the testimony of Mr. Patterson, whom they characterize as a small operator having only one salesman besides himself. The witness is alleged to have said that if on the following Monday he received 10 loads of cattle, he could go out and sell them and not take on extra help. This witness stated (R. Vol. I, p. 382):

> "I could sell 10 (cars) a day on some dates and on other days you could not."

This witness' testimony epitomizes the conditions on the market. He stated (R. Vol. II, p. 377):

> "The amount that I could sell in a day would be guess work. The law of supply and demand, the price at which cattle are being offered, all are elements in the time taken to sell cattle. On different days different packers are looking for different types of cattle. On one day you might sell a certain type of cattle to one packer buyer and then on the next day he would not buy the same type of load at any price."

The next witness referred to by the Government is Mr. Brotzman. He is stated to have asserted that on a good market a steer salesman could sell 5 carloads a day. This assertion begs the question by the limitation "on a good market day." Furthermore, the Government ignores the rest of Mr. Brotzman's testimony. Without confining his answer to a "good market" day, the witness said:

> "I would not want to say how many cattle a man could sell in a day because so many things enter into the trade." (R. Vol. II, p. 857).

The witness Woods is referred to as testifying that on the preceding day his firm had received 17 loads of cattle which were sold by three salesmen. Taking this par-

ticular day and multiplying the performance of that day by the number of market days in a year is like saying that an automobile which can go one hundred miles an hour on an open highway can go at the same speed through traffic.

The testimony of Mr. Greene is upon the same basis—namely, what had been sold in a particular day on a particular market. It is only by taking isolated instances and assuming that such instances, when multiplied by the number of market days in the year which furnished a criterion for the performance of a year, that the Secretary is enabled to make the findings which he does make in respect to reasonable performance. The Secretary's findings are without evidence either statistical or by testimony. The statistical average is 392 cars per year per man, showing the fallacy of arriving at 1,000 cars of cattle and calves per year per man by multiplying a chosen performance of a chosen day.

We shall not lengthen this reply by referring specifically to the testimony relating to the selling performance for hogs and for sheep. The performance deemed reasonable by the Secretary for these species was arrived at in the same manner and by the same method—namely, by taking isolated statements of witnesses, assuming that the performances designated in those statements could be multiplied indefinitely and at any time, and by ignoring the complete testimony of such witnesses; and, in addition, ignoring the fact that the statistical evidence of what the hog and sheep salesmen actually did reveals that for hogs no single firm reached the prophetic achievement of 1,060 carloads per year, and that for sheep only two firms reached the Secretary's goal of 1,035 carloads.

In respect to sheep, the Government cites the example of John Clay & Co. and of Merrion & Wilkins. These are the two firms, and the only two, who reached the goal set by the Secretary.

When the performance required for each species is over two and one-half times the market average, something more fundamental must be found to support the performance demands of the Secretary than isolated and only partially quoted testimony.

V.

THE EVIDENCE DOES NOT SUPPORT THE SECRETARY'S FINDINGS AND ALLOWANCE FOR BUSINESS GETTING AND MAINTAINING.

In its summary of argument, point III, in respect to business getting and maintaining expenses, the Government asserts that the record contains abundant evidence of excessive and unreasonable expenditures for this purpose. To fully reply to all of the assertions in respect to the evidence found in the Government's brief under the head of business getting and maintaining expenses would require a brief of inordinate length. As in the case of performance of salesmen, the conclusions drawn by Government counsel are from isolated excerpts from the testimony and not from a digest of the entire testimony of any witness or all of the witnesses. The unwarranted conclusions drawn by the Government and stated in its brief put an undue burden upon the Court and opposing counsel in the sifting and winnowing of evidence. We refer to a few instances:

O. T. Henkle, Vice-President and General Manager of the Union Stock Yard and Transit Company, is quoted as stating that the size and general reputation of the Chicago market is a strong drawing factor throughout the country, and would obtain a considerable volume of business regardless of whether it or the market agencies advertise. The Secretary ignores the other statements of this witness (R. Vol. I., p. 304) as follows:

> "If a liberal allowance is not made for business getting and maintaining that business might go to a point

where some other solicitor or some other competitive point would have facilities or regulations where he could go out and get it. Where the business is lost to Chicago, the unit cost for that which remains would necessarily increase. The hog business reaching Chicago on a commission basis is dwindling and it is going East and some to interior packing points, causing a great reduction in the stock yards revenue as well as to commission men. If the Government were to reduce the allowance for business getting and maintaining from $4.50 per car to $1.50 to $2.00 per car, I believe the business would be further reduced, and create greater losses on the part of the commission men and the stock yards company."

The Government refers to the testimony of the witness Roy E. Murphy, a farmer engaged in raising live stock and patronizing the Chicago market. He is alleged to have stated, on page 809 of the record, that it is price and not advertising which brings business to the Chicago market. The sentiment of this witness, himself a shipper, is shown by his further testimony upon the same page (R. Vol. II., p. 809):

"As to whether I feel that I might be injured by any action on the part of the Government which would limit me in the right to receive that information, you cannot very well speak about the future to what extent it might injure you, but I know that I would miss it. I know that I would much prefer to go on with the information and that branch of the service with that added item than I would without it, and I absolutely feel that if that added to my cost of marketing not more than I am now paying that I would feel that it should not be restricted so far as I am concerned."

The witness John Swanson is referred to from page 408, Vol. II. of the record, as stating that it is service which maintains business. In the same sentence the witness said that solicitation brings new business. Further he said, page 409:

"We have to solicit business to retain some of our

old business as well as to get new business; and I do not think service alone sufficient to retain the old business, but it is a great factor."

The Government says that on page 408 of the record the witness talked about extravagant expenditures for advertising. The witness said no such thing anywhere in the record. Nor did any other witnesses except Mollin and Marshall, called by the Secretary to support his views.

Further in support of the allegation of extravagant expenses, the Government refers again to the testimony of the witness Murphy (R. Vol. II., p. 804). The testimony of the witness shows that as far as solicitation to him was concerned, there was anything but extravagance. He said:

"The commission men from the Chicago Stock Yards have been at my farm at various times and looked my cattle over, but the visits were as much of a social nature as they were commercial. They did not solicit my business at that time. They have never had to do that. There was one other firm that came there besides Rice Bros., but I cannot give you their name. * * * I should say that was approximately two years ago."

The Government draws the unwarranted conclusion that because the testimony of various witnesses shows that they are attempting to reduce expenses, that it therefore follows that expenses which have been incurred must have been extravagant.

The witness Swiney is alleged to have said that some market agencies spend more for traveling expenses than they should. What the witness said (R. Vol. II, p. 720) is:

"Some people naturally travel and spend more than they should. It has seemed so always, and others might spend more to pretty good advantage. That is largely a matter of opinion. And it may be that in the case where I believe that people spend more than they should, if I were apprised of all the facts and placed in their position, I might believe that the ex-

> penditure after all was warranted because I cannot know the circumstances which cause the other man to do the things which he does in that connection."

The Government fails entirely to support its promise in the summary of the argument that it will point out abundant evidence of excessive and unreasonable expenditures. The witness Bockman, testifying in respect to business getting and maintaining (R. Vol. II, p. 702), said:

> "We made no investigations to determine whether the amount so spent was proper or improper."

The Government says that that determination was made by the Secretary. The question is still open—on what evidence?

The situation with respect to business getting and maintaining expenses may be briefly summarized as follows: The witness Moll testified that there should not be covered into rates any expenses for this purpose except that necessary to keep the names of the market agencies before the public. The Secretary adopted this view, upon the testimony of this single witness, saying:

> "Respondents are entitled to use such means and methods as will enable them to keep their names before the public" (R. Vol. I., p. 162).

If the market agencies are entitled to spend only such sums as will keep their names before the public, the sending of circulars, calendars, and letters will suffice. The amount which the Secretary deems reasonable for this function permits only keeping names before the public. By the Secretary's own avowal the allowance would do away with the service to the shipper occasioned by trips to the country for advice and conferences, in many instances at the customer's request, and some times with such frequency that the requests cannot be met (R. Vol. II., p. 772).

Every owner or manager testifying on the question of business getting and maintenance, without exception, stated

that the expenditures made by them for this function were, in their judgment, as owners or managers, warranted and necessary.

VI.

NEITHER THE SECRETARY'S FINDINGS NOR THE GOVERNMENT'S BRIEF SHOWS HOW OR UPON WHAT THE SECRETARY BASES HIS "EXERCISE OF JUDGMENT."

Recognizing that the costs found reasonable by the Secretary are below actual costs, as shown by the Secretary's own figures, the Government justifies the allotments made for reasonable costs upon the basis that they are arrived at by the "exercise of judgment." Since the costs allowed as reasonable are less for every firm and for every species than actual costs, as shown in Section III herein, the exercise of judgment should be justified by something concrete and specific. One attempted answer of the Government is that experience of small volume firms having an average number of cars of cattle and calves per man of only slightly over 100 cannot be considered in determining reasonable costs because the volume is so small. To combat that answer, the appellants presented Petitioners' Exhibit 10 (R. Vol. I, p. 295). In this exhibit all of the firms selling less than 200 cars of livestock unless they handled more than 100 cars of the most valuable livestock, cattle, were eliminated. The Exhibit gives the number of each species of livestock handled by each firm for the year 1932. The four right-hand columns of the Exhibit show the allotments of the business of the small firms, as defined in the Exhibit, to the large firms in the proportion which the volume of each of the large firms bears to the total volume of the market. The elimination of the small firms entirely shows that there would be little or no effect upon the cost or business of the remaining firms.

Again, the Government says that the actual costs incurred do not furnish a proper standard of costs but must be adjusted and corrected to eliminate, as far as possible, those factors which in the past made costs unreasonable. It is the exercise of judgment, it is said, by which the alleged past unreasonable costs have been eliminated. But what costs were unreasonable? Are not the market agencies entitled to know? Is the mere fiat of the Secretary that a cost above a certain amount is unreasonable, a sufficient answer when unit costs for every firm, for every species, are above the amount deemed reasonable? And this excess of unit costs actually incurred over costs held reasonable, is from the Secretary's own figures (Government Exhibit 49). If some, or a portion, or many of the firms had costs below the amounts deemed reasonable by the Secretary, some basis might be apparent, but all of the firms exceed the Secretary's costs per head.

The Government says that in prescribing reasonable rates, it is necessary for the Secretary to estimate the costs upon which those rates are to be founded and in doing this it is necessary that he determine costs which are reasonable. In explanation of how this is done, the Government says:

> "The Government found the actual functional unit cost of each market agency by a detailed audit and examination of its business. He then proceeded on the basis of all the information before him to determine the reasonable unit costs for each function performed by appellants."

The finding of "the actual functional unit cost" was of no purpose and served no useful end if the Secretary in determining what was reasonable "by the exercise of judgment," could entirely disregard unit costs found by him.

From the whole record it is apparent that what the Secretary has ordered as reasonable costs and reasonable per-

formance is merely a prophetic goal postulated upon conditions which do not exist in the regulated business. Finding a total unit per head cost lower than that achieved by any firm upon his own figures, the Secretary is in effect saying that every firm at the Chicago market is inefficient or extravagant. And this without any support in evidence of inefficiency or wastefulness. The requirement per salesman exceeds the accomplishment of the hog salesmen of all firms; exceeds the achievement of all sheep salesmen except for two firms; and exceeds the achievement of all cattle salesmen except for two firms.

When the exercise of judgment departs so far from actualities that only in very rare instances are the demands for reasonable costs and reasonable performance met, that exercise of judgment has departed from the evidence and is not supported by it. Indeed, the Government admits that the findings of the Secretary depart from fact, actuality, and experience, because it is stated that the appellants have the burden of proving that the rates which the Secretary has prescribed "are so arbitrary, capricious, and unreasonable that he (the Secretary) has exceeded his statutory authority." Are there degrees of unreasonableness which prompts the Government to use the word "so"?

The use of that expression on the part of the Government was not accidental, for it is repeated in the brief, the Government stating that "the ultimate question is whether the Secretary in prescribing the rates has acted so arbitrarily, capriciously and unreasonably that he has exceeded his statutory authority." If the Secretary acted unreasonably at all, or in any degree, he exceeded his authority. He must confine himself to the evidence. He was entirely unreasonable, capricious and arbitrary in allowing as costs sums which he, himself, found were exceeded by every agency at the market. The Secretary might have condemned the expenses of one or of several market agencies. He cannot condemn the expenditures of all of them.

There must be, among the hundred or more firms doing business at Chicago, one who conducts its business efficiently and with reasonable expense. The Secretary's order was a condemnation of the entire market. And the only justification for this condemnation is the expression "the exercise of judgment."

VII.

Confiscation.

Upon the issue of confiscation, the Appellants stand upon their original brief. Allegations and proofs were made in respect to each appellant.

The lack of necessity for further argument on confiscation is demonstrated by the statement in the Government's brief that "a large number of firms have operated at a loss under the present rates, thus indicating that the costs of these firms are excessive."

There are two points in respect to this statement: First, the absurdity that because a business loses money, its costs are too high; and second, the admission of losses under the present rates. The Secretary would reduce income still more.

The Government lays great stress upon the irrelevant fact that the Secretary's rates yield with some excess an amount greater than the costs found reasonable by the Secretary. The appellants make no contention otherwise and specifically so stated in their principal brief. To argue this point, upon which the Government devotes the entire second section of its brief, is to beg the entire question in this case.

Respectfully submitted,

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